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NO. 90-366

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DAVID T. FLAHERTY,
Petitioner,
v.
THOMAS S., by his guardian *ad litem*, JOYCE M. BROOKS, JEANETTE H., TODD C., PHILLIP B. and MARGARET R., by her guardian *ad litem*, CORNELIUS MANLY, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF SUBMITTED BY THE STATE OF VERMONT ON BEHALF OF THE STATES OF FLORIDA, MISSOURI, MONTANA, NORTH DAKOTA, PENNSYLVANIA, PUERTO RICO, AND WYOMING AS AMICUS CURIAE IN SUPPORT OF GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST OF AMICI CURIAE

The Fourth Circuit Court of Appeal's decision in *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir. 1990), is a precedent which would hamper tremendously the states' provision of services to the mentally retarded. An expansive view of the substantive due process rights of persons with mental retardation, coupled with a more onerous application of the "professional judgment" standard for determining violation of those rights, forms the basis of the Fourth Circuit's affirmance of the district court's remedy -- a

remedy which transgresses the boundaries of the federal courts' equitable powers. The net effect of this remedy is an unconstitutional usurpation by the federal courts of local autonomy over a state's mental health system. Such a usurpation could, if the decision is allowed to stand, extend into the areas of child welfare and corrections. For these reasons, and the reasons stated below, amici strongly urge the Court to grant certiorari in this case.

One of the most disconcerting aspects of the district court decision affirmed by the Fourth Circuit Court of Appeals is an unwarranted disregard for the limited resources of a state. The district court, citing its own previous decision in the same case, stated that "a 'lack of funding or of established alternatives is not a factor which may be considered in determining the scope' of the constitutional right." *Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1200 (W.D.N.C. 1988) citing *Thomas S. v. Morrow*, 601 F.Supp. 1055, 1059 (W.D.N.C. 1984). While the district court's observation is true on its face, the scope of the constitutional rights, as defined by the Fourth Circuit, for people with mental retardation in state custody is broader than those rights articulated in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (*Youngberg*). Further, in order to determine the individual remedy for each member of the class, the district court appointed a special master. *Thomas S. v. Flaherty*, 699 F.Supp., at 1025. Such appointment was affirmed by the Court of Appeals. *Thomas S. v. Flaherty*, 902 F.2d 250, 255-56 (4th Cir. 1990).

The consequence of the district court's remedy is that the federally-appointed special master, without any accountability to the people of North Carolina, may create habilitation plans and dictate community placement without consideration of the availability of North Carolina's resources. The remedy, coupled with the inclusion in the class of plaintiffs those who are no longer in state custody, is antithetical to the long-standing constitutional principle that "a state is under no constitutional duty to provide substantive services for those within its borders." *Youngberg v. Romeo*, 457 U.S., at 317 citing *Harris v. McRae*, 448 U.S. 297, 318 (1980) and *Maher v. Roe*, 432 U.S. 464, 469 (1972). Further, the remedy evidences a disregard for the "special and specific position" which "States occupy . . . . in our constitution-

al system." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985). Therefore, the district court's remedy, if the affirmance is allowed to stand, becomes a remedial paradigm which not only threatens state autonomy but also violates fundamental tenets of federalism.

Of equal concern to the amici is the standard of "professional judgment" as redefined by the Fourth Circuit Court of Appeals. As Petitioner has already argued, the Fourth Circuit misapplied the standard of professional judgment in its deference to outside professionals. *Pet.*, 17-23. Additionally, the relief shaped was based on the facts that practices were inconsistent with the "Secretary's written policies" and that recommendations of treating professionals had not been implemented. *Thomas S. v. Flaherty*, 902 F.2d, at 252. In short, the Fourth Circuit Court of Appeals incorrectly derives a constitutionally-protected entitlement from state administrative policies and the opinions of treating professionals. Not only does such an analysis present Eleventh Amendment problems (see *Pennhurst State School v. Halderman*, 465 U.S. 89 (1983) (*Pennhurst II*), but this approach by the Fourth Circuit also stifles a state's aspiration to improve treatment programs. State officials and treating professionals will be less likely to explore and encourage preferred treatment programs if such exploration and encouragement becomes the basis for federal liability when these attempted innovations fall short of the mark.

REASONS FOR GRANTING CERTIORARI

I. THE SUBSTANTIVE DUE PROCESS RIGHTS IDENTIFIED BY THE FOURTH CIRCUIT AND THE STANDARD OF PROFESSIONAL JUDGMENT DEFINED BY THE FOURTH CIRCUIT ARE INCONSISTENT WITH THE UNITED STATES SUPREME COURT DECISION IN *YOUNGBERG v. ROMEO*.

The Fourth Circuit's decision is in clear conflict with other circuits. *Pet.*, 19-23. The Fourth Circuit's decision is also inconsistent with the United States Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Specifically, the Fourth Circuit extends *Youngberg* to create substantive rights which were never contemplated by the United States Supreme Court. The Fourth Circuit then determines liability by misdefining the standard of "professional judgment" while ignoring the parameters of that standard as set out in *Youngberg*. The Fourth Circuit approach in applying the standard of professional judgment also contravenes the Eleventh Amendment.

A. The Fourth Circuit's Application and Definition of Professional Judgment is Inconsistent with Youngberg and Violates the Eleventh Amendment.

The Fourth Circuit's definition of the standard of professional judgment does not comport with *Youngberg* in several respects. First, as argued by Petitioner, the Fourth Circuit overly deferred to the opinion of outside professionals. *Pet.*, 17-23. The Fourth Circuit tacitly ignores the problems of state resources, an issue discarded by the district court in its erroneous ex-

tension of *Youngberg*. *Thomas S. v. Flaherty*, 699 F.Supp., at 1200. The Fourth Circuit also runs afoul of the Eleventh Amendment by premising state liability on a failure to implement the recommendations of treating professionals or failure to meet state policy goals. *Thomas S. v. Flaherty*, 902 F.2d, at 252.

The Fourth Circuit transforms such recommendations and goals into entitlements which are protected by federal courts. The ruling, in essence, incorrectly holds that when a state does not adhere to its own administrative policies, for whatever legitimate reasons, citizens of that state can seek remedies in federal court. The reasoning of the Fourth Circuit is directly contrary to the United States Supreme Court's ruling in *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*).

In *Pennhurst II*, the United States Supreme Court held that:

> [A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when - as here - the relief sought and ordered has an impact directly on the state itself.

Id., at 117. In this case, the Fourth Circuit ordered relief based on state administrative policy rather than state law, but the result is still the same. By the Fourth Circuit's reasoning, the optimum goals of state administrative policy not only define the standard of "professional judgment," but also define the concept of "minimally adequate training." The result of such reasoning is that state goals are elevated to a federally protected entitlement. There is no doubt that the relief ordered will have a direct impact on the state itself. Therefore, the Fourth Circuit's relief is barred by the Eleventh Amendment.

Further, in focusing on the recommendations of treating professionals and the policies of the Secretary, the Fourth Circuit misconstrues *Youngberg's* directive to courts to "show deference to the judgment exercised by a qualified professional." *Youngberg v. Romeo*, 457 U.S., at 322. Such "deference" does not mean a court must or should, as the Fourth Circuit did, focus

on and substitute as a constitutional right one "of several professionally acceptable choices [which] should have been made." *Id.*, at 321 citing *Romeo v. Youngberg*, 644 F.2d 147, 178 (3rd Cir. 1980). The focus required by *Youngberg* is simply whether "professional judgment *in fact* was exercised." *Id.* (emphasis added). In other words, courts should focus on the treatment program being implemented and determine if that program reflects professional judgment. The standard of professional judgment is not violated simply because there exists a preferable alternative. See *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2nd Cir. 1984): "The district court erred in assuming that the Youngberg professional judgment standard was not met if experts at trial disagree with care or treatment decisions that were actually made, or think another course of conduct would have been better."

The Fourth Circuit erred in its use of surveys, conducted by the Joint Committee on Accreditation of Hospitals (JCAH) and the Health Care Financing Administration (HCFA), to determine violations of the professional judgment standard. *Thomas S. v. Flaherty*, 902 F.2d, at 252-53. The Fourth Circuit correctly cites *Woe v. Cuomo*, 729 F.2d 96 (2nd Cir. 1984) (*Woe*), for the authority that accreditation by JCAH and HCFA is *prima facie* evidence of adequate care which may be rebutted. *Thomas S. v. Flaherty*, 902 F.2d, at 253. In finding the Petitioner's case to be rebutted, however, the Fourth Circuit relied on evidence insufficient for that purpose under *Woe*.

In *Woe*, the Second Circuit Court of Appeals stated that the *prima facie* evidence of JCAH accreditation may be rebutted when a court is "presented with evidence that JCAH has, across-the-board or in a given instance, allowed its standards to slip below constituted benchmarks." *Woe v. Cuomo*, 729 F.2d, at 106. There is no indication in either the district court decision or the appellate court decision that such evidence was presented. Further, the court in *Woe* was also faced with a decertification by the United States Department of Health and Human Services. *Woe v. Cuomo*, 729 F.2d, at 106. Neither actual decertification by HCFA nor questions of accreditation by JCAH were present in the instant case.

Finally, the use of the JCAH and HCFA surveys to determine a violation of the professional judgment standard conflicts with policy considerations explicit in *Youngberg*. In *Youngberg*, the Court emphasized the necessity of allowing institutions for the mentally retarded "-- often, unfortunately, overcrowded and understaffed -- to continue to function." *Youngberg*, at 324. With this in mind, the Court employed the professional judgment standard in order to minimize "interference by the federal judiciary with the internal operations of these institutions." *Id.*, at 322.

In this case, the above policy considerations of *Youngberg* have been discarded by the Fourth Circuit. Instead of minimizing the intrusiveness of the federal courts, the Fourth Circuit's misdefined standard allows the federal court to control the operation of a sizable portion of North Carolina's mental health system. The day-to-day operations of the facilities in question will be controlled by the federal judiciary rather than by the "appropriate professionals." *Youngberg v. Romeo*, 457 U.S., at 323.

B. The Fourth Circuit's Finding of a Right to "Minimally Adequate Habilitation in a Setting Minimally Adequate to Reduce Self-Abuse and Aggression" is Unsupported by Youngberg.

In its decision, the Fourth Circuit Court of Appeals rejected the Petitioner's argument that the district court improperly determined that there existed a right to treatment in the least restrictive environment. *Thomas S. v. Flaherty*, 902 F.2d, at 253. Instead the Fourth Circuit identified the right as a "right to *minimally adequate* habilitation in a setting *minimally adequate* to reduce self-abuse and aggression." *Id.* (emphasis in original). Amici would, of course, agree that treatment should take place in a minimally adequate setting. However, the Fourth Circuit's definition of "minimally adequate setting" creates, in most, if not all cases, a constitutional right to community placement. The

right to community placement identified by the district court and the Fourth Circuit is not supported by *Youngberg*.

The "setting" in which habilitation takes place was not at issue in *Youngberg*. The *Youngberg* decision dealt with those substantive rights "which involuntary commitment proceedings do not extinguish." *Youngberg v. Romeo*, 457 U.S., at 315. Specifically not at issue in *Youngberg* was the setting of such involuntary commitment since the patient had conceded that "no amount of training will make possible his release." *Id.*, at 317. Further, the liberty interest in freedom from undue restraint survives involuntary commitment. *Id.*, at 316. As the Second Circuit noted: "This implies that involuntary commitment by itself is not undue restraint." *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1247 (2nd Cir. 1984).

In this area of "setting," the Fourth Circuit's approach is semantic more than substantive. The Fourth Circuit attempts to conceal a least-restrictive environment analysis in *Youngberg's* phrasing of minimally adequate treatment. But whether the terms "minimally adequate" or "more normal environment" or "alternative habilitation settings" are used, there can be little doubt that what the Fourth Circuit means is "least restrictive environment." The Fourth Circuit's observation that the district court's order does not "require community placement of all class members," *Thomas S. v. Flaherty*, 902 F.2d, at 254, avoids the fundamental issue of whether the Constitution requires the community placement of any of the class members. The consensus among the circuits is that no such entitlement exists under the Fourteenth Amendment. *Pet.*, at 14.

II. THE REMEDY AFFIRMED BY THE FOURTH CIRCUIT EXCEEDS THE EQUITABLE POWERS OF A FEDERAL COURT AND IS INCONSISTENT WITH *SWANN* AND *MILLIKEN II*.

The Fourth Circuit attempts to circumvent Petitioner's Eleventh Amendment argument by categorizing the remedy as prospective injunctive relief. *Thomas S. v. Flaherty*, 902 F.2d, at 255. The Fourth Circuit also declares that the remedy "fully comports with the remedy approved in *Milliken v. Bradley*, 433 U.S. 267 (1977)" (*Milliken II*). Similarly, in fashioning the remedy, the district court relied not only on *Milliken II* but also on *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) (*Swann*). *Thomas S. v. Flaherty*, 699 F.Supp., at 1205. The remedy in this case is, however, wholly inconsistent with the guidelines of *Swann* and, therefore, inconsistent with *Milliken II*. The remedy affirmed by the Fourth Circuit, whether characterized as retrospective or prospective, exceeds the equitable powers of a federal court.

Any discussion of a federal court's exercise of equitable powers and the parameters of those powers must center around *Swann*. In *Swann*, the United States Supreme court dealt with the issue of what remedy for school desegregation could be fashioned by a federal district court in the face of a constitutional mandate to dismantle segregated school systems and the failure of local school officials to devise and implement an appropriate plan for the dismantlement. The constitutional mandate with which *Swann* sought to comport was, of course, the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), to "eliminate racially separate public schools established and maintained by state action." *Swann*, 402 U.S., at 5. The Court stated in *Swann* that a "district court's equitable powers to remedy past wrongs is broad." *Id.*, at 15.

These equitable powers, no matter how broad, are not, according to *Swann*, without limitations. The equitable powers of a federal court "may be exercised only on the basis of a constitutional violation." *Id.*, at 16. Such "judicial authority enters only when local authority defaults." *Id.* Further, the nature of the violation determines the scope of the remedy. *Id.*

Applying the principles of *Swann* to the instant case, the Fourth Circuit's remedy is flawed. There is no constitutional violation to warrant the exercise of equitable powers. *Youngberg* issued no constitutional mandate which, in scope, is comparable to that issued by *Brown v. Board of Education*. *Youngberg* formulated no right to a "minimally adequate setting" requiring community placement. The Fourth Circuit's standard of "professional judgment" used to determine liability is inconsistent with *Youngberg* in both application and definition.

In the absence of a constitutional violation, the remedy fashioned by the district court and affirmed by the Fourth Circuit cannot be squared with the United States Supreme Court decision in *Milliken II*. In *Milliken II*, the Court explicitly stated that federal equitable remedies:

> [E]xceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.

Milliken II, at 282, citing *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976). In the instant case both the district court and the Fourth Circuit fail to establish the necessary relationship between the supposed constitutional violations and the appointment of a special master to decide habilitation and placement issues without regard to resource issues. See also *Society For Goodwill to Retarded Children v. Cuomo*, 902 F.2d 1085, 1091 (2nd Cir. 1990): "If the court finds constitutional violations, the relief it orders should be narrowly tailored to cure those violations."

The decisions of the district court and the Fourth Circuit require a "sharper focus on the concept of 'right,' and a more precise definition of the related 'remedy.'" Dixon, *Bakke: A Constitutional Analysis*, 67 Cal. L.Rev. 69, 79 (1979). Petitioners' actions in this case have been measured against a distorted standard of "professional judgment" elevated to the status of a purported right which has no basis in federal constitutional law. The court fashions a remedy which exceeds the limits of equitable power defined by *Swann* and transgresses basic precepts of federalism as set forth in the Eleventh Amendment. Such a result, if allowed to stand, threatens the autonomy of every state.

CONCLUSION

For all the above reasons, the Court should grant the Petition for Writ of Certiorari.

This the 26th day of September, 1990.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing BRIEF OF AMICI CURIAE IN SUPPORT OF THE GRANT OF CERTIORARI upon the following parties to this action by depositing a copy of the same in the United States Mail at Waterbury, Vermont, first class postage prepaid, and addressed as follows:

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